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CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JASPAL SINGH,

Petitioner,

v.

ALBERTO R. GONZALES, Attorney
General,

Respondent.

No. 04-75545

Agency No. A79-400-682

MEMORANDUM^{*}

On Petition for Review of an Order of the
Board of Immigration Appeals

Submitted January 9, 2006^{**}

Before: HUG, O'SCANNLAIN, and SILVERMAN, Circuit Judges.

Jaspal Singh, a native and citizen of India, petitions for review of the Board of Immigration Appeals' order summarily affirming an immigration judge's ("IJ") decision denying his motion to reopen removal proceedings conducted in absentia.

^{*} This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

^{**} The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

To the extent we have jurisdiction, it is conferred by 8 U.S.C. § 1252. We review the denial of a motion to reopen for abuse of discretion. *See Rodriguez-Lariz v. INS*, 282 F.3d 1218, 1222 (9th Cir. 2002). We dismiss in part and grant in part the petition for review.

We lack jurisdiction to review the BIA's decision not to invoke its sua sponte authority to reopen. *See Ekimian v. INS*, 303 F.3d 1153, 1159 (9th Cir. 2002).

The IJ abused his discretion in denying Singh's motion to reopen alleging ineffective assistance of counsel for failure to comply with the requirements of *Matter of Lozada*, 19 I. & N. Dec. 637 (BIA 1988), because the legitimacy of Singh's claim was "plain on the face of the administrative record." *See Castillo-Perez v. INS*, 212 F.3d 518, 525 (9th Cir. 2000). Singh was prejudiced by his prior counsel's failure to argue that the immigration court sent his notice of hearing to the incorrect address. *See id* at 527 n.12 ("[p]rejudice is found when the performance of counsel was so inadequate that it may have affected the outcome of the proceedings"); *Busquets-Ivars v. Ashcroft*, 333 F.3d 1008, 1010 (9th Cir. 2003). Furthermore, contrary to the IJ's conclusion, the defective representation by counsel equitably tolled the numerical limit on motions to reopen. *See Rodriguez-Lariz*, 282 F.3d at 1227.

Accordingly, we remand to the agency to grant Singh's motion to reopen.

**PETITION FOR REVIEW DISMISSED in part; GRANTED in part;
REMANDED.**